This point was not raised in any of the cases which have been cited as authority in the present discussion, but it is submitted that Mr. Pomeroy's position is thoroughly tenable. The attitude which the courts have taken toward this question, and which has been the basis of the decisions in the leading cases on the subject, is admirably expressed in the opinion delivered by the Court in Sherridan *v.* Colvin,[14] in which it was said as follows:

> "The subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, actual or prospective, is the foundation upon which the jurisdiction rests. The court has no jurisdiction of matters merely criminal or merely immoral, which do not affect any right to property."

T. M. B.

LIABILITY OF A MASTER FOR THE TORTS OF HIS SERVANT'S UNAUTHORIZED ASSISTANT.—It is not within the province of this note to consider cases in which the servant has authority, either express or implied, to employ assistants. Nor shall we discuss instances in which the acts done are without the scope of the servant's employment. The cases considered are those in which a mere servant invites or permits a stranger to assist, in the absence of authority from his master.

The courts have not always given uniform answers to the question of the liability of a master to third persons for the negligence of one to whom his servant, without special authority, has attempted to delegate his undertaking in whole or in part. In the early English case of *Booth* v. *Mister*,[1] the owner of a horse and cart was held liable where, through the negligence of one to whom his servant had given the reins, plaintiff was injured. In holding the master liable, Lord Abinger said:

> "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself."

In a leading case [2] on the subject in this country, a master had directed his servant to shovel snow off a roof. Without authority to do so, the servant procured an assistant, through whose negligence a passer-by was injured, and the master was held liable. This liability of the master, where the stranger is acting in the presence of the servant and with his consent, has been upheld by many later cases.[3] It is often said in these cases that the assistant is the mere

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Supra.

[1] 7 Car. & P. 66, 32 Eng. Com. Law 439 (1835).

[2] Althorf *v.* Wolfe, 22 N. Y. 355 (1860).

[3] Wellman *v.* Miner, 44 N. Y. S. 417 (1897); Hollidge *v.* Duncan, 199 Mass. 121, 85 N. E. 186, 17 L. R. A. (N. S.) 982 (1908); Geiss *v.* Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N.

instrumentality of the servant, and that his negligence is the servant's negligence, for which the master is liable, since the act is done in the course of the servant's employment.

The recent case of *Gates* v. *Daley*,[4] seems to follow the principles laid down above. In that case the defendant was the owner of an automobile truck and had employed a man to drive it. In the regular course of his employment, the driver, acccompanied by his wife, went on a long trip in the vehicle. At a point on the journey the driver became fatigued, and, in order temporarily to rest himself, allowed his wife to operate the truck. While she was at the wheel, an accident occurred in which the plaintiff was injured. The driver had no authority from the defendant to engage a substitute or assistant to drive the truck. The plaintiff sued the defendant for the injuries sustained, and the court held the defendant liable, citing *Althorf* v. *Wolfe*,[5] and *Geiss* v. *Twin City Taxicab Co.*,[6] as authority.

We have thus far considered only those cases in which the assistants committed the acts of negligence in the presence of, and therefore impliedly under the direction of, the servants. Some cases go further, however, and hold the master liable when the servant is not present, but has entrusted his work to an assistant without authority to do so, and the negligence of the assistant results in injury to third persons.[7] For example, in the case of *Osteen* v. *South Carolina, etc., Co.*,[8] the servant was a soliciting agent for the defendant manufacturer, and used a team in his work. At the end of a trip he turned the team over to a boy with instructions to return it to the plant. The agent had no authority to engage a driver, but the master was held liable for injuries resulting to a pedestrian from the negligence of the driver in handling the team.

Many courts, however, lay down the general rule that a master is liable for the negligence of one whom a servant has employed to assist him, only when the servant had authority to employ such assistant.[9] In the case of *Haluptzok* v. *Great Northern R. Co.*,[10] the court said:

S.) 382 (1913); Dillon *v.* Mundet, 145 N. Y. S. 975 (1914); Slothower *v.* Clark, 191 Mo. App. 105, 179 S. W. 55 (1915); Thomas *v.* Lockwood Oil Co. (Wis.), 182 N. W. 841 (1921).

[4] (Cal.), 202 Pac. 467 (1921).

[5] *Supra*, note 2.

[6] *Supra*, note 3.

[7] Lakin *v.* Oregon Pac. R. Co., 15 Or. 220, 15 Pac. 641 (1887); Ellefson *v.* Singer, 116 N. Y. S. 453 (1909); Osteen *v.* South Carolina, etc., Co., 102 S. C. 146, 86 S. E. 202, L. R. A. 1916B, 629 (1915).

[8] *Supra*, note 7.

[9] Haluptzok *v.* Great Northern R. Co., 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739 (1893); Thyssen *v.* Davenport, etc., Co., 134 Iowa 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572 (1907); Board of Trade Bldg. Corp. *v.* Cralle, 109 Va. 246, 63 S. E. 995, 132 Am. St. Rep. 917, 22 L. R. A. (N. S.) 297 (1909); Levin *v.* City of Omaha, 102 Neb. 328, 167 N. W. 214 (1918); Blumenfeld *v.* Meyer-Schmid Grocer Co. (Mo.), 230 S. W. 132 (1921).

[10] *Supra*, note 9.

"* * * if a man is to be held liable for the acts of his servants, he certainly should have the exclusive right to determine who they shall be."

But the courts which hold the master liable only when the servant had authority to employ an assistant, say that this authority may be implied from the nature of the work to be performed, or from the general course of conducting the business of the master by the servant; and it does not seem necessary that there should be an express employment of the person in behalf of the master, or that compensation be paid or expected.[11]

It would seem to accord with principle to hold a master liable where his servant, having requested a stranger to assist him, is present and in a position to control and direct the stranger's actions. This is the position taken by the courts in the cases of *Booth* v. *Mister*[12] and *Althorf* v. *Wolfe*,[13] the two cases most frequently cited to support the liability of the master. There is a very good statement of this principle in the case of *Blumenfeld* v. *Meyer-Schmid Grocer Co.*,[14] where the court said:

"The courts have frequently placed the liability of the master upon the ground that a stranger, to whom the servant has delegated his duties, is a mere instrumentality by which the servant performs such duties, and that therefore the stranger's negligence is that of the servant. This doctrine appears to be sound enough when applied to a case where the servant does not delegate his duties in the entirety, but remains present and the duties performed by the stranger are performed under the eye and the immediate supervision of the servant * * *"

It would also seem to accord with principle to hold that where a servant, without authority, express or implied, has employed an assistant, and turned over the undertaking to him completely, without being present to direct or advise, and the unauthorized assistant, by his negligence, injures third persons, the master should not be liable.[15]

N. P., JR.

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[11] Haluptzok *v.* Great Northern R. Co., *supra;* Levin *v.* City of Omaha, *supra.*

[12] *Supra,* note 1.

[13] *Supra,* note 2.

[14] (Mo.), 230 S. W. 132, 137 (1921).

[15] For a full discussion of the principle here involved, see 3 MICHIGAN LAW REV. 198.